

APPEAL NO. 022454
FILED NOVEMBER 18, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on September 3, 2002. The hearing officer determined that (1) the compensable injury of _____, includes the respondent's (claimant) lumbar spine problems after (subsequent date of injury); and (2) consistent with the parties' stipulation, the appellant (carrier) waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021. The carrier appeals the determinations on legal and evidentiary grounds. The claimant did not file a response.

DECISION

Affirmed.

The claimant testified that he slipped and fell at work on _____, injuring his low back. The claimant was initially seen by a company doctor, who diagnosed him with a lumbar strain. Subsequent x-rays, however, revealed a spondylolisthesis at L5-S1 and the claimant was referred to his treating doctor for further treatment. An MRI later confirmed the existence of an L5-S1 spondylolisthesis with right paracentral disc herniation and revealed an L4-5 broad based disc protrusion with mild overall stenosis. The claimant's treating doctor indicated in his reports that the conditions at L5-S1 pre-existed the claimant's fall on _____, but were aggravated and made worse by the incident. The claimant received conservative care for his injury.

On or about (subsequent date of injury), the claimant was involved in an automobile accident unrelated to his employment. The claimant described the rear-end collision as having a hard impact which shook him back and forth forcefully. The claimant admitted that the accident caused him pain in his low back and that he missed a week's work as a result. Notwithstanding, an MRI following the accident revealed no changes in the claimant's lumbar spine when compared to previous images, and the claimant's treating doctor opined that the claimant's lumbar injury was not affected by the accident.

The carrier stipulated that it waived its right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021. Given the waiver, the hearing officer found that the compensable injury included spondylolisthesis and degenerative changes to the lumbar spine. The hearing officer also found that the claimant did not sustain any additional damage or harm to his lumbar spine as a result of the automobile accident and that the rear-end collision was not the sole cause of the claimant's continued lumbar spine problems.

The carrier asserts that the hearing officer erred in finding that the compensable injury included spondylolisthesis and degenerative changes to the lumbar spine. The

claimant contends that the finding was unnecessary because the compensability of these conditions was not at issue before the hearing officer. The issue before the hearing officer was stated as follows: Does the compensable injury of _____, include the claimant's lumbar spine problems after (subsequent date of injury)? In order to answer that question, it was necessary, in our view, for the hearing officer to first determine which conditions comprised the compensable injury.

The carrier also contends that it waived into a lumbar strain injury only and that the dispute with regard to the remaining conditions is an extent-of-injury issue, to which Section 409.021 does not apply. In recent decisions addressing carrier waiver, we have held that a carrier may not avoid the mandates of Section 409.021 by recasting the primary injury as an extent-of-injury issue. See Texas Workers' Compensation Commission Appeal No. 021907, decided September 17, 2002; Texas Workers' Compensation Commission Appeal No. 021569, decided August 12, 2002; and Texas Workers' Compensation Commission Appeal No. 022183, decided October 9, 2002. The evidence is clear, in this case, that the primary claimed injury included spondylolisthesis and degenerative changes to the lumbar spine. As such, the hearing officer did not err in determining that such conditions were compensable by virtue of the carrier's waiver under Section 409.021.

Next, the carrier appeals the hearing officer's determination that the compensable injury included the claimant's lumbar spine problems after (subsequent date of injury). In order to prevail on this issue, the carrier had the burden to show that the claimant's automobile accident was the sole cause of the claimant's continuing lumbar spine problems after (subsequent date of injury). The hearing officer reviewed the record and found no credible evidence supporting the carrier's position. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). In view of the evidence presented, we cannot conclude that the hearing officer's determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **TRAVELERS INDEMNITY COMPANY OF CONNECTICUT** and the name and address of its registered agent for service of process is

**DAN FLANAGAN
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AUSTIN, TEXAS 78746.**

Elaine M. Chaney
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

Margaret L. Turner
Appeals Judge